IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

CARLOS ARMSTRONG
vs.
THE UNITED STATES. } No. 509.

APPELLANT'S BRIEF IN REPLY TO BRIEFS AND ARGUMENTS OF THE UNITED STATES.

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APPELLANT'S BRIEF IN REPLY TO THE BRIEF AND ARGUMENT OF THE ATTORNEY-GENERAL.

As heretofore stated, Carlos Armstrong resides in Porto Rico, at the city of Ponce, and is there a merchant.

He purchased goods, wares, and merchandise subsequent to the signing of the protocol of peace between Spain and the United States at the conclusion of and prior to the passage of an act of Congress which has been styled in this argument as the Foraker Act at New York, Philadelphia, and Baltimore, and shipped the same to Ponce, Porto Rico, for consumption.

The War Department compelled him to pay a tariff duty on said goods at Ponce, and the money therefrom was paid into the United States Treasury, where it now is. Mr. Armstrong sued in the Court of Claims to recover this money, holding that it was illegally demanded upon his goods so purchased and shipped as above stated.

He makes this claim for a recovery of this money on the ground that upon the ratification of the treaty of peace with Spain, whereby Porto Rico was ceded to the United States, the island of Porto Rico became a part of the United States of America and subject to its jurisdiction; and that throughout the United States "taxes, duties, imposts, and excises *shall be uniform*," and that "no tax or duty shall be laid on articles imported from any State. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another." And that the words "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another" apply to the Territories as well as the States and to the Territories in connection with the States.

The War Department collected duties at Ponce, Porto Rico, on goods shipped there from New York, Philadelphia, and Baltimore, as though New York, Philadelphia, and Baltimore were of a different jurisdiction from Ponce, and that Porto Rico was a foreign country to the United States, instead of a part of it.

There is no dispute that these tariff duties were levied and collected on appellant's goods as though they went to a foreign country; and it

must be, therefore, conceded that if said goods were not shipped from New York, Philadelphia, and Baltimore to a foreign country these duties were illegally exacted and may be recovered in this action.

AS TO THE JURISDICTION OF THE COURT OF CLAIMS TO ENTERTAIN THIS ACTION.

By chapter 21 of the Revised Statutes of 1878, section 1059, it is provided that:

The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. "All claims founded upon any laws of Congress, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, and all claims which may be referred to it by either House of Congress."

Under the jurisdiction provided by this section Mr. John S. Mosby, in 133 U. S., page 273, sued the Government for the amount of unofficial fees collected by him for certifying invoices for goods exported to the United States from Hongkong while he was consul at that port, which fees he paid into the United States Treasury upon the demand of the Treasury officials.

In paying these moneys into the United States Treasury he did not concede that the Government had a right to compel him to pay said moneys over to it, but as it was demanded of him, rather than involve himself in a controversy with the State Department while holding a subordinate position in it, and because he was compelled to obey orders or be dismissed from office, and thereby subject himself to the imputation of appropriating money which did not belong to him, he paid the money into the United States Treasury. In doing this he relied on the good faith of the Government to pay whatever belonged to him on a final statement of his accounts.

In a suit based upon these facts he recovered his said fees, and the Court of Claims was held to have jurisdiction of the action.

In the decision in the Mosby case the rule of the court in Lawson's case, 104 U. S., 164, was followed.

The facts set up in the petition in appellant's case show that appellant paid the duties demanded of him by the army officers in Porto Rico under protest, and relied upon the Government to restore the same to him should it after all be found that the duties were unlawfully exacted. This case is on all fours, therefore, with the Mosby case, and the Court of Claims undoubtedly properly entertained jurisdiction of the case.

It is also hereby suggested that the Court of Claims has jurisdiction of this action on the ground that it arises under a regulation of the executive department.

The act of February 24th, 1855 (10 S. L., 612), endowed the Court of Claims with jurisdiction of a claim arising under any regulation of any Executive department.

And in Harvey's case, 3 C. Cls., p. 38, it was held that such a "regulation" means a rule made by the head of the department for its action, under an act of Congress conferring power to do so.

Congress declared war against Spain, and gave to the President the power to carry on said war to a successful issue. In pursuance of his duties under said Congressional authority the President made the regulations quoted in former brief.

This is a claim arising under said regulations, and by the jurisdic-

tional acts above referred to the court is endowed with jurisdiction of the claim sued on. The case in the Court of Claims went off on a demurrer to the petition, and while the Attorney-General demurred on the ground that the Court of Claims was without jurisdiction in the subject-matter of the action, as well as upon the ground that the petition did not state facts sufficient to constitute a cause of action, the court passed over the first ground of the demurrer, holding that it had jurisdiction of the action, and decided the question on the second ground of demurrer, holding that the petition did not state facts sufficient to constitute a cause of action.

The petitioner appealed from the judgment of the court in sustaining the demurrer on the ground of insufficiency of facts stated in the case, and was content with the assumption of jurisdiction of the action by said court.

The Attorney-General was apparently satisfied with the action of the Court of Claims on the question of its jurisdiction of the subject-matter herein, for he did not appeal from the judgment of the court on the question of jurisdiction. It is, therefore, a little out of order for the Attorney-General to now discuss in his brief the jurisdiction of the Court of Claims in this action. And it would seem that by his failure to appeal from the judgment of the Court of Claims on the question of jurisdiction that he admitted the jurisdiction of that court in this action.

But whether he has or not, we meet him on the issue of jurisdiction, and insist that the Court of Claims properly entertained jurisdiction of the subject-matter of this action, and there is positively no tort involved in the matter.

The only court which has jurisdiction of the claim set forth in the petition is the Court of Claims.

The district court for the district of Porto Rico, established by the act of Congress of April 12th, 1900, is limited to the general jurisdiction now exercised by the circuit and district courts of the United States (Laws 1900, chap. 191, sec. 34). This claim could not be prosecuted in any circuit or district court of the United States, both because the petitioner is an alien and because the amount in suit is over $10,000. The suit is also within the general jurisdiction conferred upon the Court of Claims by the Tucker Act, and it has been expressly decided that a subject of Great Britain can sue the United States in this court.

No tribunal has ever been constituted by act of Congress or any order of the President of the United States for the hearing and determination of claims of this class. There is no provision in the act of April 12th, 1900, for reviewing the decisions of the customs officers in relation to duties assessed and paid upon goods imported from the United States into Porto Rico; nor is there any act of Congress, or any order of the President, providing for any review of the questions arising out of the imposition and collection of duties by the military officers upon goods imported into Porto Rico from the United States.

The claim is not founded upon any tariff law of the United States, nor does it arise out of the payment of duties under any act of Congress, hence the customs administrative act of June 10, 1900 (26 Statutes at Large, 131, 1st Supp. R. S., p. 744), can have no application. The procedure provided in sections 12 to 15 of that act would not give the petitioner an opportunity to raise the questions as to the

legality of these duties which he has presented in his petition. That act applies only to customs duties paid on merchandise imported from a *foreign* country into a port of the United States where such duties have been assessed by the customs officers of the Treasury Department under the provisions of the general tariff laws. Such procedure can not be held to apply to a review of the actions of the military officers acting under orders of the President.

If any proceeding could be taken before any board of general appraisers such board would not have power to pass upon the questions raised by the petition with reference to the constitutionality of the imposition of these duties and the alleged violation of the treaty of Paris by such imposition. The only questions which can come before the board of general appraisers for determination under the statute are as to the *rate* and *amount* of duties charged upon imported merchandise. The question of whether an article is imported merchandise and subject to the imposition of duties can not be raised before the board of appraisers or upon any appeal from their decision, and to institute proceedings under the customs administrative act amounts to a concession that the article is imported merchandise and subject to imposition of duties.

In re Fasset, 142 U. S., 479, at 487.

The cases based upon *Nichols* v. *U. S.*, 7 Wall., 122, in which the jurisdiction of this court is denied on claims arising under the revenue laws where Congress has provided "a system" for their adjustment, do not apply to the claim at bar, which is based not upon any revenue law, but upon an alleged unconstitutional exercise of power by the President and military authorities.

No other method having been provided by Congress for the hearing and determination of this class of claims, it follows that this claim is within the general jurisdiction of this court.

Smithmeyer vs. *U. S.*, 147 U. S., 342.
Campbell vs. *U. S.*, 107 U. S., 407.
Broulatour vs. *U. S.*, 7 Ct. Cl., 853.
Debow vs. *U. S.*, 11 Ct. Cl., 672.
Roughton vs. *U. S.*, 13 Ct. Cl., 330.
Keator vs. *U. S.*, 21 Ct. Cl., 175.
Simons vs. *U. S.*, 10 Ct. Cl., 603.
Foster vs. *U. S.*, 32 Ct. Cl., 170, at 195.

The petitioner's claim is "founded upon the Constitution of the United States," and is clearly within the jurisdiction conferred upon this court by the Tucker Act (24 U. S. Stat., 505). "That the Court of Claims shall have jurisdiction to hear and determine all claims founded upon the Constitution of the United States is as comprehensive and untrammeled a grant of judicial authority as the legislative power could well make."

Stovall, Admr., vs. *U. S.*, 26 Ct. Cl., 226, at 238, 239, 240.

The case of Sherman against United States, 178 U. S., 150, was a suit brought for the recovery of $8,969.02, which had been exacted of the appellant by the collector of internal revenue for the 14th district of New York under the act of June 13, 1898, and this court sustained the jurisdiction of the lower court to determine the controversy. This case is even stronger in support of the jurisdiction of the Court

of Claims of the action at bar than the Mosby case, since the Court of Claims might be impelled to adhere to its former action in the Mosby case.

The form of action in the Sherman case is precisely that of the Armstrong case.

THE PLEADED FACTS.

The facts pleaded established an implied contract on the part of the United States to refund the amounts paid by the claimant under compulsion of the military authorities.

Of course, in discussing this point, we shall assume that a cause of action is stated against the United States, and limit our argument to showing that it is an action on implied contract and not an action sounding in tort.

The allegation in the petition is "that said officers and agents of the United States demanded and collected of the petitioner, against his protest and over his objection, duties and taxes on said goods, and petitioner, in order to obtain his said goods and continue to carry on his business, was compelled to and did pay duties and taxes as aforesaid, aggregating a total sum of $31,530.65, which said money was received into the Treasury of the United States."

It is well settled that an action against the United States to recover money illegally taken from the owner by an officer or agent of the United States, acting under the orders of his superior officer, or the regulations of an executive department, or money paid to the Government's agent in order to enable the owner to take possession of his property, is in the nature of an action for money had and received, based upon an implied contract within the meaning of the Tucker Act.

Ingram vs. *U. S.*, 32 Ct. Cl., 147.
Johnston vs. *U. S.*, 17 Ct. Cl., 157.
Simons vs. *U. S.*, 19 Ct. Cl., 601.
N. Y. Cons. Card Co. vs. *U. S.*, 20 Ct. Cl., 174.
Keator vs. *U. S.*, 21 Ct. Cl., 175.
Swift & Co. vs. *U. S.*, 111 U. S., 22.
Campbell's Case, 107 U. S., 407.

The petitioner's case is that of money which has been wrongfully paid and may be recovered back.

Le Peyre's Case, 7 Ct. Cl., 165.
" " " 17 Wallace, 191.
Lawson's Case, 14 Ct. Cl., 332.
" " 104 U. S., 164.

If the commissioners made an illegal assessment of taxes under 12th Stat. Large, 292, 422, the person who paid more than his proportion may recover under section 3689.

Seabrook vs. *United States*, 21 Ct. Cl., 39; see also Simon's Case, 19 Ct. Cl., 601.

Money illegally exacted by a Government officer, under circumstances which make payment necessary to avoid the discontinuance of the business in which the payee is engaged, may be recovered.

Swift & Co. vs. *The United States*, 111 U. S., 23; 105 U. S., 691.

The rule, as to money which may be recovered, is that the *claimant had a lawful right to it when received.*

The court has jurisdiction of claims arising under the revenue laws, based upon an implied promise to repay money collected, though there may be another mode of recovery.

Schillinger's Case, 1 Ct. Cls., 16. Money paid under protest without color of right for internal-revenue taxes may be recovered. Boehm's Case, 20 Ct. Cls., 241.

Proceeds of property illegally seized by the United States may be recovered.

Thayer's Case, 20 Ct. Cls., 139.

If petitioner had not protested against this payment of duties and taxes, the Attorney-General would have insisted, doubtless, that the same was a "voluntary payment" which could not be recovered back. Now that the petitioner protested he declares that this protest makes the action a tort, but this is not so. Where money is illegally exacted the law creates an obligation to refund it.

Bank of U. S. vs. *Bank of Washington*, 6 Pet., 8; *Steamship Co.* vs. *Emmigration Comrs.*, 113 U. S., 33.

SECOND GROUND OF DEMURRER.

Does the amended petition state facts sufficient to constitute a cause of action?

The claimant acted with propriety in paying the duties demanded by the agents of the United States. He asserted his right to receive the goods as from one domestic port of the United States to another domestic port without paying a tariff duty. He declared that Porto Rico was a part of the United States. He demanded the right to have and receive the goods free of the demands of the War Department officers. He did not concede the right of the United States to collect said duties under the President's order—(regulation). He protested against the payment and collection of said duties.

Like the Mosby Case (133 U. S., 273), the question for determination is *whether the tariff duties collected were such as claimant was bound to pay under the laws of the United States and the President's orders.* If they were not, then the claimant, having paid same under protest, may recover same.

AN ALIEN MAY SUE.

Section 1068, R. S. U. S., provides that—

> "Aliens who are citizens or subjects of any Government which accords to citizens of the United States the right to prosecute claims against such Government in its courts shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject-matter and character, might take jurisdiction. (Act of July 27, 1868.)

United States vs. *Keefe*, 11 Wall., 178.
Carlisle vs. *United States*, 16 Wall., 147.
Hill vs. *United States*, 8 Ct. Cls., 470.
Ficheras's Case, 9 Ct. Cls., 334.

At page 22 of his brief the Solicitor-General insists that the rule established in the Nichols Case (7th Wallace, 129) shows that the Court of Claims has no jurisdiction in this case; but it is sufficient answer to

him to say that the Nichols case was one arising under the internal-revenue laws, and a special remedy was given, so that the Court of Claims should not assume general jurisdiction thereof.

In the Hill case, cited at page 25 of the Solicitor-General's brief, it was expressly claimed by the United States that the land upon which the lighthouse was situated belonged to the United States, and that the United States, upon the adoption of the Constitution, acquired the paramount right to the use of this submerged land for a lighthouse without making compensation therefor; and that any title or right conferred on the plaintiff by the subsequent statute of the State was necessarily subject to this paramount right of the United States.

There could not be the relation of contract between the United States and the plaintiff in said case, unless the Government in some way had acknowledged in the plaintiff the title to lands upon which the lighthouse was situated. This the Government had not done.

The Gibbons case, cited on the same page of the Solicitor-General's brief, was one in which the tortious acts of an officer were sought to be made the basis of an implied contract, which of course could not be done.

In the Langford case,[1] cited on the same page of the Solicitor-General's brief, "It was not alleged in the petition, nor admitted in the plea, that the United States had ever in any way acknowledged any right of property in the plaintiff against the United States." * * * The United States positively and precisely pleaded that the land was submerged under the waters of Chesapeake Bay, one of the navigable waters of the United States, and that the United States, under the law, for the purpose of a lighthouse, has a paramount right to its use as against the plaintiff or any other person.

The Schillinger case, cited at page 26 of the Solicitor-General's brief, was where one George W. Cook entered into a contract with the United States to do certain artificial stonework in the Capitol grounds. Schillinger was not a party to the contract between Cook and the United States; and Cook deliberately put in the Schillinger patented artificial stone without any permission from Schillinger.

The United States did not know Schillinger in the transaction, and there was absolutely no possible opportunity for a contract relationship to be established between Schillinger and the United States. There was no privity of contract between Schillinger and the United States. The petition in that case upon its face sets this fact out and charges tort upon the Government for permitting Cook to put in the

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[1] ERRATA.

In the hurry in printing (p. 12) an error has been made by omitting what was quoted from the Langford Case (101 U. S., 341) and crediting to the Langford case a portion of the quotation from the Hill case. Therefore read the said quotation as part of the Hill case.

In the Langford case appellant claimed the lands, which were also claimed by the Government, and sued for their use and occupation, which constituted a tort.

But at page 343 of the decision the court held:

"We are not prepared to deny that when the Government of the United States, by such formal proceedings as are necessary to bind it, takes for public use, as for an arsenal, custom-house, or fort, land to which it asserts no claim of title, but admits the ownership to be private or individual, there arises an implied obligation to pay the owner its just value."

In such a case the Court of Claims would properly entertain jurisdiction of a suit for the value of the land taken.

Lawson's case (p. 9 of the brief) is put down as in 104 U. S., instead of 101 U. S.

Schillinger artificial stone in his contract with the United States for said work.

In no sense, therefore, can the Schillinger case be considered a guide to the jurisdiction of the Court of Claims in this case.

The Berdan case does not serve the defendants in the case at bar. That case decides that an averment of an infringement of patent to Berdan, *in the absence of anything disclosing a contract for its use*, would be a tort; but "where it appears that the use of that invention was with the consent and in accordance with the wish of the inventor and the Berdan Company, and with the thought of compensation therefor," the Court of Claims is authorized to find the damage due the petitioner; and in that case said court did fix the royalty.

None of the cases, therefore, cited by the Solicitor-General can apply to the facts in this case; for in the case at bar the petitioner, a merchant in business at Porto Rico, a Territory of the United States, purchased goods, wares, and merchandise in New York, Baltimore, and Philadelphia, and took said goods, wares, and merchandise to his place of business in said Porto Rico for domestic consumption. Upon their arrival in said Porto Rico the officers and agents of the United States, acknowledging petitioner's ownership of the said goods, wares, and merchandise, collected of him, over his protest, a tariff duty and taxes thereon by an order of the President of the United States.

CAN DUTIES PAID PRIOR TO THE RATIFICATION OF THE TREATY BE RECOVERED?

Appellant purchased goods in New York, Philadelphia, and Baltimore, and took them to Porto Rico immediately after the signing of the protocol between Spain and the United States, and prior to the ratification of the treaty between said powers.

He also purchased goods at the above-named places and took them to Porto Rico for domestic consumption there, after the treaty of peace was ratified.

The question, therefore, is as to the duties on these two classes of goods. The Solicitor-General in his brief, at page 27, assumes that appellant maintains that, by the protocol Porto Rico was ceded to and became a part of the United States, and that, consequently, an end was put to the authority of the President to govern Porto Rico, and also says, at the top of page 28, that "these propositions seem so absurd that to state them is to refute them."

We have to say that in these statements the Solicitor-General has not fairly represented the position of the appellant. Appellant insists that he should have back all of the duties paid by him prior to the ratification of the treaty, because the treaty is only the fulfillment of the protocol, and therefore relates back to the time of the surrender of the authority of Spain to the United States, and makes the protocol a part and parcel of the negotiations by and through which the sovereignty of the Kingdom of Spain over Porto Rico was surrendered to the United States as of the date of the signing of the protocol.

The United States authority over, and peaceable possession of, said, Porto Rico, has been absolute and undisputed since August 12, 1898. By virtue of this undisputed authority there and then established, the President collected duties of the petition from that date.

We affirm, therefore, that it is only because of this undisputed sovereignty, and the promise to cede Porto Rico to the United State as of

the settlement of the war that these duties could have been and were collected.

From the time of the signing of the protocol, appellant acknowledged the sovereignty of the United States over Porto Rico, and paid tribute to the United States as the sovereignty of that island.

We further maintain that the collection of these duties can not be justified on the ground that their collection at such a time was a war measure, for war had ceased, or in the terms of the protocol hostilities were suspended. The territory assumed a status of peace and quiet, and the presence of the sovereignty of the United States was recognized as a distinct power of civil government there established.

The terms of the protocol were therefore extended to and became a part of the treaty finally concluded. The treaty refers to said protocol, and concludes and carries out its provisions. It must, therefore, relate back to the times and conditions of that protocol, and include the acts done in pursuance thereof.

It is upon this theory that the duties collected before the ratification of the treaty are sued for.

Now, this may seem absurd to the learned Solicitor-General, but it is sustained by contract relationships from time immemorial and by matters in which *nunc pro tunc* entries in the courts have been used.

The question of these duties are, therefore, not "so absurb" as the Solicitor-General *affects to believe*. It is no answer to the relation of the treaty with ... otocol to say that if no treaty had finally been concluded that the ... done under the protocol in pursuance of the privileges thereby secured are not to be respected, or appellant accepted the protocol in good faith and recognized only the sovereignty of the United States thereafter. None but United States sovereignty thereafter therein prevailed.

Neither is it claimed by the appellant that the protocol made Porto Rico an integral part of the United States. It only promised to make it a part of the United States and recognized and acknowledged the jurisdiction of the United States in that island; so that, for all commercial purposes, Porto Rico was from that time forth a part of the United States, because the treaty was subsequently ratified in pursuance thereof.

But these objections of the Solicitor-General can only go to the duties *collected proir to the ratification of the treaty.*

As to the duties exacted *following* the ratification of the treaty, by which Porto Rico became a part of the United States, there can be no such objection urged.

Appellant's counsel does not "think that under the war power, all the President can do is to fight." Appellant's counsel "thinks" that the President may do anything which may be necessary to effect and secure the results of the war he wages under authority of Congress; and that if it becomes necessary to the carrying out of the military and naval operations of the United States in the island of Porto Rico after proclamation of war against Spain to collect the tariff duties which he did collect, that he might lawfully do it.

If it were necessary for the President to maintain the army of the United States in Porto Rico, or to the *de facto* government which he set up after the protocol was signed that he should collect money of the merchants doing business in that island, he should be freely granted that right.

But was this necessary? Upon what principle of warfare is this right asserted? We can think of no reason for this action.

When we insist that there is no reason for the collection of these duties, on account of the war which has been waged and for the purpose of holding the territory pending negotiations of a treaty, we do not deny to the President the "right to govern" that island. We concede to the President the *right and duty* to create and maintain a civil government for the preservation of peace and order and to secure life and property.

We also concede that he might collect revenue to support the *de facto* government which succeeds the military occupation.

But the President did not collect these duties for the purpose of sustaining the *de facto* government which he set up in Porto Rico. He collected these duties and caused the money to be covered into the Treasury of the United States, and that money was never applied to the payment of expenses of said *de facto* government, unless it may be said to have been so applied by the Fifty-sixth Congress subsequently.

The Solicitor-General not only incorrectly represents us, but he declines to recognize these facts.

It is our contention that all the President might do under his *de facto* government was to maintain the *status quo* and collect the necessary revenues to maintain the *de facto* government set up for the preservation of peace and order, and that it must remain to Congress to make the needful rules and regulations for the government of the territory thus coming within our jurisdiction. It is in this sense and in this way that we claim that these duties, prior to the ratification of the treaty, were collected without right, and assert our right to have the same returned to the appellant.

We repeat that the duties paid *following* the ratification of the treaty do not come within this class, but that Porto Rico having become a part of the United States by the ratification of that treaty and subject to its jurisdiction of government were illegally exacted; that the constitutional regulation with respect to the uniformity of duties "throughout the United States prohibits their collection," and that said duties so collected after the ratification of the treaty may be recovered back.

On page 58, of the Solicitor-General's brief, it is admitted that "the Constitution and the flag go together. Wherever the flag flies is the symbol of sovereignty of this country. It is raised by the authority created and existing under the Constitution."

This is precisely what *we* contend. And when the Solicitor-General makes this statement he, in our judgment, surrenders the great question in this case; for if the Constitution goes with the flag, then wherever our flag permanently floats there our Constitution is and abides from the time our sovereignty becomes complete by the ratification of a treaty.

It will be observed that the Solicitor-General's brief does not take the original stand assumed in the brief of the Government in the cases argued two weeks ago.

Apparently the Department is now hedging on the great question that is before this court. Instead of that despotic power with which the President was endowed in the first above-named brief in all territory outside of States, it is now urged on behalf of the Government that the President is doing in the new Territories what he has a right to do under the Constitution.

We have to say that the President can only do what he does do as the Chief Magistrate of the United States of America by virtue of the Constitution, and that whenever he does anything that contravenes the Constitution of the United States he is acting without authority, and that such acts are, therefore, void. This was what was suggested in *Cross* vs. *Harrison*, where the court said that the *de facto* government existing in California immediately after ratification of the treaty between Mexico and the United States properly there existed, and that, "of course," in the exercise of the duties of this *de facto* government, the President and his officers and agents would not contravene any of the limitations of the Constitution. The late brief also misstates our position in another place. It would have the court understand that we insist that every provision of the Constitution of the United States must apply to the new Territories. Now, we do not insist upon any such thing and have never said such thing. We say that the Constitution applies to the new Territories by the provisions of the Constitution *which was made to apply to Territories.*

Our Constitution provides for the government of States and also for the government of Territories. There are provisions relating to the government of States, others to the government of Territories, and some of these provisions apply to both. Hence, it is our position that the Constitution, together with the provisions relating to individual rights of citizens with regard to the government of Territories, applied to Porto Rico at the time the treaty of peace between Spain and the United States was ratified.

Then and there our sovereignty became complete because our title to the island became complete.

The allegiance of these citizens to the United States became imperative, and we thereby became bound by our Constitution to give them "the equal protection of the laws" of the United States, and to give to these people and that Territory the benefit of our Constitution which relates to the government of Territories.

It was in this sense that the Constitution of the United States became the "supreme law of the land," in the first place.

At the time our Government was going through the formative stage of a republic Articles of Confederation were adopted for the "States united." These Articles of Confederation applied only to the "States united."

The Ordinance of 1787 provided for the government of the territory of the United States, and these two things were the supreme law under which the United States started out on its career as an independent government.

It was soon found that there was no absolute nationality in the form of government thus established, and thereupon the people of the United States assembled in convention to form a "more perfect union," and they adopted the Constitution of the United States, which took the place of the Articles of Confederation and also the place of the Ordinance of 1787, which was made for the government of States and of Territories. And hence there were provisions of the Constitution with respect to the government of States, and Congress was endowed with the power "to make all needful rules and regulations respecting the territory and other property of the United States."

And this Constitution secured to *all* the *equal protection* of the laws of the United States.

The Constitution, therefore, in this way became the supreme law of the "land"—not the supreme law of the "States." That this was the fact about that; and it is worth our while to note how the present clause of the Constitution came to be adopted. This clause reads as follows:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land."

Now, this clause was not in this form of words when originally presented to the convention on the adoption of the Constitution.

The original draft of this clause was as follows:

> "*Resolved*, That the legislative acts of the United States made by virtue and in pursuance of the articles of union, and all treaties made and ratified under the authority of the United States, *shall be the supreme law of the respective States*, so far as those acts or treaties shall relate to the said States or their citizens or inhabitants."

After an adjournment of several days, "that the committee might prepare and report the Constitution," the following was submitted in modification of the above proposition, which reads:

> "Acts of the Legislature of the United States, made in pursuance of this Constitution, and all treaties made under the authority of the United States, *shall be the supreme law of the several States*, and of their citizens and inhabitants."

Subsequently the last above proposition was changed to read as follows:

> "This Constitution, and the laws of the United States made in pursuance thereof, and all treaties made under the authority of the United States, shall be the supreme law of the several States and of the citizens and inhabitants."

Following these modifications came the clause of the Constitution as we find it in the Constitution itself; and instead of making the Constitution, etc., "the supreme law of the respective States," or of "the several States," and their citizens and their inhabitants, it was made to read that the Constitution, etc., *shall be the supreme law of the land*, thereby and thus recognizing the necessity of having a definite direction for the government of *all land* of the United States—State and Territory. There could have been no other reason for this change in the terms of the constitutional draft.

"The land" of the United States extended to the Mississippi River. The thirteen Colonies comprised about one-third of the "land of the United States." The rest was "outlying territory," but no less "land" of the United States than Maryland and Virginia.

Moreover, the Ordinance of 1787, having been passed for the government of the western territory, speaks of the occupants of this territory as "citizens and inhabitants," and securing to said citizens and inhabitants their fundamental rights.

Since the government of the "land" of the United States was provided for, it became unnecessary to mention the "citizens and inhabitants," for the right to govern and control the "land" carried with it

the right to govern and control the "citizens and inhabitants" of the "land."

The fact that this Constitution provided for the government of *all* the land of the United States led Justice Baldwin, in his Origin and Nature of the Constitution, to say the "Constitution was intended for posterity for all times; and for the 'land,' the whole territory and all the States, old and new."

He also and further says: "This term United States designates the whole American empire. It is the name given to our great Republic composed of States and Territories." (5th Wheaton, page 514.)

For these reasons the Constitution is self-declaratory, necessarily, and operates "throughout the land" of the United States, in all provisions, thereof, relating to justice between the people and their relative rights as citizens of a common country.

In the case of *Pollard* vs. *Hagen* (3d Howard, 212), Justice Story said that "all Constitutional laws are binding on the people in the new States and the old ones, whether they consent to be bound by them or not."

Every constitutional act of Congress is passed by the people of the United States, expressed by their representatives on the subject-matter of the enactment; and in the same decision it is further stated that "when so passed it becomes the *supreme law of the land*, and operates by *its own force* on the subject-matter in whatever State or Territory it may happen to be."

Now, if the Constitution is self-declaratory and operates "by its own force," through the laws made in pursuance thereof, as is stated in this opinion, then Congress could not give it effect by going through the motion of extending it to new territory.

If the Constitution never reaches a new territory after the same has been ceded to the United States, except by an act of Congress, it will certainly never reach such territory, for Congress, being the *creature* of the Constitution, is taken to the territory by force of the Constitution, and only legislates therefor by virtue of the Constitution.

To say that Congress extends the Constitution to a new Territory is equivalent to saying that a son extends to his father the right of parental supervision of the affairs of the household.

And, since the Solicitor-General has charged us with bringing to the attention of the court the article of General Harrison, in the *North American Review* for January, 1901—which we did not do, for it had not been seen by us until our brief was printed—we will now respectfully refer the court to the said article as a worthy and instructive discussion of the general subject of the relation of the new Territories to the United States of America. The article embodies the views of a great lawyer, a patriotic citizen, an ex-President of the United States.

If the learned Solicitor-General means to say that the Constitution applied to the Territories and the States included within the original boundaries of the United States, but that, as to the new Territory, it can not apply until Congress decrees it, then we would ask by what right under the Constitution may Congress make new States. For new States are made by virtue of the Constitution and these States are made out of *territory of the United States.*

It is respectfully submitted that when the United States "takes over" new territory and the people thereof, the Constitution and the flag go there together, and they there together exercise jurisdiction and dominion.

The Constitution is on the spot when the transfer of title is made, because it is the entity of Government.

This Constitution, being the supreme law of the land, there can be nothing above it—nothing so great as it is, because it is the supreme law of the United States.

Porto Rico is "land" of the United States, because the title thereto has passed to the United States. The Constitution, therefore, becomes the supreme law of Porto Rico, as it is of any other "land" of the United States.

The Solictor-General "effects to believe" that we maintain that *every* provision of our Constitution applies to Porto Rico.

We have to say to this that we not only do not maintain such a position, but have to say that there is not a foot of land in the United States, old or new, where *every* provision of the Constitution does apply.

We simply maintain that the Constitution respecting the government of territory of the United States and the equal rights of men does apply to Porto Rico, and that the government of that island by the President of the United States up to the time Congress makes "needful rules and regulations" must be within the Constitution and by direction of the Constitution, and that the laws of the United States to be there enforced must be laws passed in pursuance of that Constitution.

And that, therefore, when the President proceeds to the collection of tariff duties on goods, wares, and merchandise shipped from New York, Philadelphia, and Baltimore to the island of Porto Rico for consumption there he is acting in violation of the Constitution and in contravention of it. For our Constitution expressly provides that duties and excises "shall be uniform throughout the United States."

The Solicitor-General can not escape this "uniformity" clause by saying that the President must have the right to enforce the collection of tariff duties on such goods, because he is charged with the due execution of the laws of the United States. He must not enforce duties and excises against such goods, for the "supreme law of the land" makes a nonuniformity out of such exactions of duties and excises.

Again, it is no answer to the objection to this taxation in Porto Rico to say that the President shall undertake to collect duties on goods shipped from New York, Pennsylvania, or Maryland to Porto Rico for the purposes of administration a bit more than it is necessary to enforce the collections of duties and excises on goods sent from said States to Oklahoma or Alaska.

It has never been found necessary to the government of any *other* Territory of the United States to exact such duties and excises.

We note that the Attorney-General in his brief of two weeks ago, in the Goetze case, made the specious plea that unless the President might enforce a nonuniformity of duties and excises with respect to Porto Rico that he would be crippled in his administration of the affairs of that island. We respectfully deny that he will be crippled in his administration of the affairs of that island unless he possesses arbitrary power. We insist that the Constitution of the United States with respect to the Territories is sufficient for such administration, and when he acts within its scope he will be on safe ground.

We insist that under our system of Government despotic power is not necessary to its administration. The fathers of the Republic took this advanced position and have transmitted to their posterity a republican form of Government described in a Constitution which is equal to

the government of all its possessions. To say that the Republic of the United States in the absence of despotic power for everything outside of States is incapable of the exercise of the functions of an independent Government is to make a statement shocking to American citizenship.

This Government is not like Richard Third, the hunchback, "born before his time, misshapen, and unsightly to look upon," but is a Government born in the full time of its conception without a hump on its back and so sightly to look upon that all the people of the earth "know the good land of hope as surely as the swallow knows the land of summer."

The Solicitor-General utterly abandons the position assumed by Congress in passing the fifteen per cent duty law for Porto Rico, and parts company with what was understood to be the position maintained by the Attorney-General in his brief in the Goetze case. He takes the refreshing position that this *is* a constitutional Government—republican in form—and that the President governs Porto Rico by virtue of the Constitution.

And now comes the Attorney-General himself in a brief in the case at bar, in which he declares that we have misapprehended him in the Goetze case. He says that he stated—

> "That the United States has been vested not with all powers, but only with certain particular powers. These particular delegated powers are in some respects limited and confined in scope and operation, but in other respects they are entirely unlimited." (P. 3 and 4.)

Now, we would not misrepresent the Attorney-General in what he maintains, and if we have incorrectly quoted from his brief and unfaithfully set forth his propositions, we beg to say that we have certainly misunderstood him. But by what he now says in the last line of the above quotation have we misunderstood his assertions?

If by saying that in "other respects they are entirely unlimited" he means to say that the Constitution has conferred upon the United States Government unlimited powers as to the government of the Territories, then we have only misstated him in the sense that these unlimited powers have been derived from the Constitution. But did the Attorney-General mean that the Constitution had conferred these "unlimited powers?"

At page 130 of his brief in the Goetze case he says that a "*republican form of government is guaranteed to the States, but not to the Territories. Outside the area of the United States, considered as a union of States, there is no political power, no guaranty of republican government*, no pledge against local discriminations by way of port charges, or regulations of commerce or revenue or tax on exports; nor any rule of uniformity as to duties, imposts, and excises."

But by what he now says in the last line of the above quotation have we misunderstood his assertions?

In this late brief the Attorney-General asserts that the taxing power in the Territories is "absolute, unlimited, and arbitrary," that "there is no question of inherent justice or personal rights at stake."

If, therefore, no republican government is guaranteed to the Territories and the power to tax them is "absolute, unlimited, and arbitrary," how much short of despotism is it?

Is no republican form of government guaranteed to the Territories?

The Constitution does not, in express terms, name a republican form of government for the Territories; but is not a republican form of government for the Territories *implied by its terms?* Have we not a republican spirit in our institutions? What has become of the "spirit of our institutions?"

Now, we assert that a republican form of government *is guaranteed* to the Territories; that Congress and the President can institute and enforce no other form of government in the Territories, and that equal and exact justice in taxation is secured to the Territories as well as to the States.

Congress is to make the "needful rules and regulations" for a republic—not a monarchy.

Now, we understand that the Constitution of the United States does give political power in the territory of the United States outside of the States, and that it is only by the "political power" granted by the Constitution that the Territories may be governed.

What does the Constitution plant in the Territories if it is not "political power."

By the above language of the Attorney-General's brief it was understood that he intended to say just what he did there say, namely, *that there was absolutely no political power in the Government of the United States outside of the States of the Union.*

If this is not what was meant we confess our inability to understand what such language does mean.

However this may be, there is certainly a radical change of base upon the part of the Government in its defense in these cases from that previously assumed, for, are not the above quotations from the Attorney-General's brief inconsistent with the Solicitor-General's statement that the Constitution goes to the Territories with such political power as to grant to the citizens residing therein freedom from *any bill of attainder, ex post facto law, title of nobility, or a law impairing contracts and a right to* be sustained in life, liberty, and the pursuit of happiness, and immunity from appropriation of their property without due process of law?

Are these not political rights? Are they not secured by the political power given to the Territory and its inhabitants *by the Constitution?*

The learned Solicitor-General also agrees in his argument that Congress must establish justice and insure domestic tranquillity in the Territories of the United States.

Yet he says that the clause relating to the uniformity of duties and taxes throughout the United States can not be held to apply to the Territories of the United States. For, he says, since Congress is the exclusive legislature of the Territories, there was no necessity for saying that duties should be uniform throughout the United States as to the Territories, whereas with reference to the States there was such a necessity, because in the absence of such a provision in the National Constitution the States would pass all kinds of tariff duties and make different rates of duties which would work confusion and harm to trade and commerce.

Now, it is respectfully submitted that if there is any reason in the world why the said "uniformity clause" would apply exclusively to the States this would be the reason therefor.

But is this a sound reason? Would it not be as unjust to the resi-

dents of the Territories of the United States to discriminate against them in the tariff duties of the United States as to allow the States to discriminate against each other? Would this be establishing justice and insuring domestic tranquillity?

Is it not true that the "uniformity clause" of the Constitution respecting tariff duties must necessarily apply to the Territories as well as the States? For Congress is commanded by the Constitution to make a law which shall be absolutely uniform.

The duty of Congress is not complete in the passage of a tariff law with respect to uniformity when it has prevented the States from passing different laws with relation to such matters, but it also owes the same duty to the people who reside within the Territories.

The command is to make the duties uniform throughout the United States. For we must always bear in mind that this Constitution was made for the Territories as well as for the States.

The reason for the Solicitor-General, then, for believing that this uniformity clause meant that the States should not be permitted to pass different laws relating to tariff duties is not well founded, in this: The Constitution did not authorize the States to pass any kind of a tariff law without the consent of Congress. Therefore the very reason assigned by the Attorney-General for not making duties uniform throughout the Territories and States is the reason it must be done. And again, it was not necessary to name the Territories in this provision, because Congress makes the territorial legislation, and it would have no difficulty in securing uniformity.

Congress is charged with the entire supervision of the rate of duties, excises, and taxes, and is required to make uniform regulations therefor throughout the States and Territories.

That this is the purpose and intention of this constitutional regulation is proven by the fact that this regulation should extend to every part of the country where *business* is done, and it was certainly meant to reach business wherever done *throughout the United States.* The Territories from the beginning had such business relations as made it necessary to import goods from foreign countries, and to ship goods and wares out of this country to foreign countries.

If only the original thirteen States had any business with tariff schedules, excises, and taxes at the time of the adoption of the Constitution, there might be some sense in the claim made now by the Solicitor-General.

But in view of the fact that a large business was carried on in the territory of the United States outside of the thirteen original colonies at the time of the adoption of the Constitution precludes the possibility of the meaning of the uniformity clause contended for upon the part of the Solicitor-General.

Justice Story says that this was a means of preserving the equality of the States.

He was directing his remarks to the question of the State governments solely.

He does not say that this equality and uniformity of "duties, excises, and imposts" shall not also extend to the Territories by the implications of the Constitution.

To tax with an "absolute, unlimited, and arbitrary" hand would be subversive of the very principles of equality upon which our Government was founded.

The Attorney-General is too narrow in this contention and too broad in his interpretation of arbitrary power.

We must establish justice and insure domestic tranquillity throughout the length and breadth of our domain, and the only way to do this is to adhere to the equality of rights and the same uniformity of taxation in the Territories as we maintain in the States.

To this end the Government of the United States was founded, and a republican form of government is everywhere guaranteed.

However this may be, the duties sued for in this case were not charged upon the theory that Porto Rico was then, and is now, a part of the United States.

They were charged against appellant's goods on the theory that Porto Rico is a country foreign to the United States.

The duties charged and collected thereon were "foreign duties."

On no other grounds could they have been demanded and collected, for they were not necessary, as has been seen, to the administration of the affairs of the island. These duties were collected of appellant by an order of the President.

Therefore, whether uniformity of duties between domestic possessions is to be the guide or not, these duties were illegally exacted and may be recovered in this action.

The Attorney-General in his oral argument is especially severe on appellant because he is a British subject. In view of our *cordial* relations with Great Britain, this is hardly justified.

Appellant has a perfect right to sue in the Court of Claims under our statute, and it should not be urged against him that he is a British subject to the disparagement of his case.

Moreover, Mr. Armstrong's case is only one of a hundred of this class (although the only foreigner among them), and was selected as the test case because it involved an *amount* which would enable us to appeal to this court from the court below.

Armstrong's case is not the question here so much as the right to treat Porto Rico as a foreign territory with respect to duties, imposts, and excises.

We therefore submit, first, that all duties paid by Armstrong since the ratification of the treaty with Spain are recoverable beyond question; and second, that the rights embraced in the *protocol* having been secured by the *treaty*, the duties paid by appellant after the signing of the protocol and before the treaty are also recoverable.

Respectfully submitted.

JOHN C. CHANEY,
ALPHONSO HART,
Appellant's Attorneys.

No. 509.—October Term, 1900.

CARLOS ARMSTRONG

vs.

THE UNITED STATES.

For briefs and arguments in behalf of the United States in this case see No. 456—De Lima *vs.* Bidwell.

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 614.

CHRISTIAN HUUS, APPELLANT,

vs.

NEW YORK AND PORTO RICO STEAMSHIP COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED DECEMBER 14, 1900.

SUPREME COURT OF THE UNITED STATES.

October Term, 1900.

No. 514.

CHRISTIAN HUUS, APPELLANT, VS. NEW YORK AND PORTO RICO STEAMSHIP COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

United States Circuit Court of Appeals for the Second Circuit.

CHRISTIAN HUUS, Libellant, Appellant,
vs.
NEW YORK AND PORTO RICO STEAMSHIP COMPANY, Respondent, Appellee.

A decree dismissing the libel in the above-entitled action having been made in the district court of the United States for the southern district of New York, and an appeal having been taken therefrom to this court, and the cause having come on for final hearing, certain questions of law arose concerning which this court desires the instruction of the Supreme Court of the United States for its proper decision. The facts out of which the questions arose are as follows:

The action was brought by libellant to recover spoken pilotage amounting to the sum of $74.34. The respondent denies the right to such recovery. Libellant, on the 25th day of June, 1900, offered his services as a Sandy Hook pilot to the master of the American-built steamship "Ponce," hailing from New York and belonging to the New York and Porto Rico Steamship Co., a corporation organized under the laws of the State of New York, to take such vessel into the harbor of New York by the way of Sandy Hook, the said vessel being at such time bound from the port of San Juan, in the island of Porto Rico. The said libellant was a Sandy Hook pilot duly licensed under the laws of the State of New York, and competent to act as such. He was the first and only pilot offering his services. The master of the vessel declined the services of such pilot and himself brought his vessel into the port of New York by the way of Sandy Hook. The aforesaid amount is the regular pilotage prescribed by statute for vessels of the draught of the Ponce, and such amount was demanded from the owner of the vessel and payment thereof refused. The said steamship Ponce was, at the time in question, enrolled under the laws of the

United States and licensed to be employed in carrying on the coasting trade, and her master was duly licensed to act as pilot in the bay and harbor of New York under the laws of the United States. Said vessel, at the time mentioned, was engaged in trade between the island of Porto Rico and the port of New York, and laden with a cargo of merchandise shipped at San Juan, including sugar for delivery at New York. Said vessel, at the time mentioned, was not a registered vessel, and was sailing under the license aforesaid, whereof the following is a copy:

"UNITED STATES OF AMERICA:

License of Vessels of Twenty Tons or More for Carrying on the Coasting Trade for One Year.

DISTRICT OF THE CITY OF NEW YORK,
PORT OF NEW YORK.

In pursuance to Title L, 'Regulation of vessels in domestic commerce,' of the Revised Statutes of the United States, —— New York and Porto Rico Steamship Co., inc., owner, Frederick R. Rohl, sec'y, and Frank E. Dyer, master, agreeing that the steamship called the Ponce, burden 3,503 tons and — hundredths gross, 2,519 tons and — hundredths net, as appears by her enrollment, issued at New York, N. Y., numbered 265, and dated May 31st, 1900, shall not be employed in any trade, while this license shall continue in force, whereby the revenue of the United States shall be defrauded; and said master having also sworn that this license shall not be used for any other vessel, or for any other employment than is herein specified, license is hereby granted for the said vessel called the Ponce, of New York, N. Y., to be employed in carrying on the coasting trade for one year from the date hereof, and no longer.

Given under my hand and seal at the port of New York, in the district of the city of New York, this second day of June, 1900, *in the year one thousand nine hundred.*

(Signed) F. RAYMOND, [SEAL.]
Deputy Collector of Customs.

(Signed) J. WELCH, [SEAL.]
Deputy Naval Officer."

The questions of law which arose in the cause concerning which this court desires the instruction of the Supreme Court for its proper decision are as follows:

1. Since the proclomation of the treaty of peace between the United States and the Kingdom of Spain and the passage of the act of Congress entitled "An act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes" (approved April 12, 1900), do Porto Rican ports remain foreign ports in the sense in which those words are used in the statutes of the State of New York regulating pilotage?

2. Are vessels engaged in trade between Porto Rican ports and ports of the United States engaged in the coasting trade in the sense in which those words are used in the statutes of the State of New York regulating pilotage?

3. Are steam vessels engaged in trade between Porto Rican ports

and ports of the United States coastwise steam vessels, in the sense in which those words are used in section 4444 of the Revised Statutes of the United States?

In accordance with the provisions of section 6 of the act of March 3, 1891, entitled "An act to establish circuit courts of appeals and for other purposes," the foregoing questions of law are by the circuit court of appeals for the second circuit hereby certified to the Supreme Court.

Dated this 17th day of December, 1900.

WM. J. WALLACE,
E. HENRY LACOMBE,
N. SHIPMAN,
Judges of the Circuit Court of Appeals for the Second Circuit.

[Endorsed:] United States circuit court of appeals for the second circuit. Christian Huus, libellant, appellant, *vs.* New York and Porto Rico Steamship Company, respondent, appellee. Questions certified to the United States Supreme Court. United States circuit court of appeals, second circuit. Filed Dec. 17, 1900. William Parkin, clerk.

UNITED STATES OF AMERICA, *Second Circuit*, } *ss:*

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing certificate in the case entitled Christian Huus against the New York & Porto Rico Steamship Company was duly filed and entered of record in my office, by order of said court, on the 17th day of December, 1900, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said United States circuit court of appeals for the second circuit this 17th day of December, in the year of our Lord one thousand nine hundred.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Endorsed:] United States circuit court of appeals, second circuit. Christian Huus *v.* New York & Porto Rico S. S. Co. Certificate for instructions. United States circuit court of appeals, second circuit. Filed Dec. 17, 1900. William Parkin, clerk.

Endorsed on cover: File No., 17,999. U. S. C. C. of appeals, 2d circuit. Term No., 514. Christian Huus, appellant, *vs.* New York & Porto Rico Steamship Company. Filed December 18th, 1900.